



**Serve Kenya Ministries (Suing through the Secretary James Mutheu Njau) v Omondi & another; Ikanda & 2 others (Applicant) (All as officials of South Coast Community Church) (Environment & Land Case 113 of 2021) [2022] KEELC 14655 (KLR) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14655 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KWALE**  
**ENVIRONMENT & LAND CASE 113 OF 2021**  
**AE DENA, J**  
**NOVEMBER 9, 2022**

**BETWEEN**

**SERVE KENYA MINISTRIES ..... PLAINTIFF**  
**SUING THROUGH THE SECRETARY JAMES MUTHEU NJAU**

**AND**

**ISMAEL DENNIS OMONDI ..... 1<sup>ST</sup> DEFENDANT**  
**LAND REGISTRAR-KWALE COUNTY ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**GODFREY IKANDA ..... APPLICANT**  
**DANIEL ACHOKA ..... APPLICANT**  
**ELIJAH MUSILI MAANZO ..... APPLICANT**  
**ALL AS OFFICIALS OF SOUTH COAST COMMUNITY CHURCH**

**RULING**

1. Briefly as a background, in this suit the 1<sup>st</sup> defendant holds the title of the suit property in his name. However, the plaintiff is the one in possession of the property and claims that the said defendant holds the same in trust for the plaintiff. As at the year 2014 the applicants who claim to be officials of the South Community Church state that the plaintiff was the landlord of the suit premises by dint of a lease agreement dated February 1, 2014 to whom they were paying rent. In the year 2019 the applicants entered into a lease agreement with the 1<sup>st</sup> defendant ostensibly as the holders of the title herein.
2. The plaintiff upon filing of this suit obtained interim orders of injunction on December 24, 2019 against the 1<sup>st</sup> defendant restraining them from dealing with the suit property. To cut the long story



short the applicants found themselves in a position where the plaintiff had directed the tenants not to remit rent to the 1<sup>st</sup> defendants and the latter was also demanding rent and had issued a notice to the tenants including the applicants to vacate. Fearing their lease with the 1<sup>st</sup> defendant would be terminated and therefore eviction they approached the court for joinder. In addition to the said joinder the applicants sought the orders issued by the court on December 24, 2019 be amended to include them and the 1<sup>st</sup> defendant to be barred from demanding for rent, distressing for rent or terminating the lease agreement dated July 31, 2019. It is upon this background that the court allowed their application for joinder but as Interested parties and not substantive parties as they had wished to be joined. Subsequently on September 24, 2021 the 1<sup>st</sup> defendant also invaded the premises through auctioneers precipitating the present application.

3. The applicants filed the present motion dated September 30, 2021, the subject of this ruling for the following orders;
  - a. Spent
  - b. That there be an order stopping the defendants by themselves, their agents including M/s Kilimanjaro auctioneers from selling or disposing the applicant's items removed from the suit premises on September 24, 2021 pending further orders of the court.
  - c. That the orders issued by CMCC Misc Civil Case No E005 of 2021-Kwale on May 4, 2021 and all proceedings thereof be stayed pending further orders of this court,
  - d. That M/s Kilimanjaro auctioneers be ordered to release to the applicant unconditionally all items removed from the suit premises on September 24, 2021,
  - e. That costs of this application be provided for.
4. The application is supported by the affidavit of Fredrick Siasa Munyithya one of the applicants. It is alleged that M/s Kilimanjaro Auctioneers impounded their property and carried it away with no proclamation served upon the applicants. That the distress for rent against the applicants before the determination of ownership of the suit property is interference with their occupation. That they were now supposed to pay rent to the plaintiffs and not the defendants. It is feared that the auctioneers might proceed and sale the goods which comprise church equipment acquired through donations, causing them irreparable loss unless restrained by the court.
5. In response to the application, the 1<sup>st</sup> defendant filed a preliminary objection stating that the applicants lacked locus standi to institute the subject motion against the 1<sup>st</sup> defendant. That the application is fatally defective on account of the court orders issued on June 16, 2021, section 17 of the *Evidence Act* and section 5 of the *Civil Procedure Act*. The plaintiff did not oppose the application as confirmed by Mr Jengo to this court on February 7, 2022.

### Submissions

6. The application was canvassed by way of written submissions. The applicants filed theirs on April 20, 2022, the 1<sup>st</sup> defendant on May 12, 2022. Parties were also given an opportunity to orally highlight on the same on May 30, 2022. Mr Jengo supported and reiterated the need for the orders of status quo to be complied with.
7. Mr Ngonze adopted his submissions and further reiterated that the interim orders of injunction lapsed on December 24, 2020 and had not been reinstated. That there was nothing on the record to show that the orders were to cover the interested party upon joinder. That the application before court should have been through contempt proceedings. The interested party had not sought the courts leave



or extension of their participation beyond the limitations placed. Counsel also submitted that the interested party and the plaintiff were the same and therefore they could not enter into a landlord and tenant relationship with each other. It is reiterated that prima facie by dint of section 25 & 26 of the Land Registration Act the 1<sup>st</sup> defendant is the registered proprietor of the suit property. That the court only distrained the sale of the goods and did not excuse the interested party from its rental obligations to either party. That there were no orders restraining the 1<sup>st</sup> defendant from levying distress and that the distress preceded the orders on status quo which orders are ambiguous as they did not state what the status quo was. In conclusion citing the finding in Macfoy v United Africa Limited (1961) ALL FR 1169 it is stated that the Interested party had no locus to lodge the application and the agreement between it and the plaintiff being a nullity there can be no cure. In response Mr Munyithya distinguished the facts in Mcfoy above reiterating that in the present case the interested party exhibited the lease which showed the plaintiff to be landlord.

### **Analysis and Determination**

8. I have considered the application, the affidavit in support of the application and the preliminary objection in opposition of the application, the submissions filed as well as the authorities relied upon. The issues that commend determination are;-

1. Whether the application is properly before this court
2. Whether the applicant is entitled to the orders sought
3. Who bears the costs of this application.

9. It is urged on behalf of the 1<sup>st</sup> defendant that the applicant has no locus standi to file the present application by dint of the orders of the court issued June 16, 2021. The orders referred to were made by my brother Justice Sila Munyao pursuant to the applicant's application dated May 27, 2020 to be joined to the suit and for the orders for injunction to be amended to restrain the 1<sup>st</sup> defendant from interfering with the applicant's occupation of the suit property whose ownership was being contested herein. I have read the ruling delivered by my brother judge. It is noteworthy that the joinder was allowed on the basis that the lease was contingent upon who emerged successful in the suit. It is also limited to the applicant's participation in the application dated December 23, 2019 filed by the plaintiffs. This is the application referred to earlier where the orders for injunction were made by Justice C K Yano on December 24, 2019. According to the 1<sup>st</sup> defendant the application has not been fully heard and determined neither has the ruling of June 16, 2021 been appealed against or the said orders set aside. To me it is simply being argued that the applicants ought to limit itself to the application dated December 23, 2019 and not file applications. My understanding is the limited participation of the applicants was not conclusive as the judge stated the applicant's further participation will be as this court may further direct. He goes on to state thus; -

‘I’m careful in saying this so that future participation of the applicants does not interfere with the hearing of the suit or subject the contesting parties to unnecessary hardship by being burdened with an additional party’.

10. From the above, the basis upon which the conditions were set are very clear and to me it was to ensure that parties are reminded that the contest is between the main parties to the suit and not the interested party. The discourse as to the extent of the participation of an interested party has been litigated in many instances in our courts. I don't think the intention of the judge was to bar the interested party from seeking refuge in the same court that has admitted them as interested parties and which court also observed that they may crave to have some orders as to the fate of their lease or occupation pending



determination of the ownership. Where else could this party seek assistance other than to the very court that has recognized their interest. The applicants only found themselves in the middle of this dispute which has led to their being distrained for rent whether the interim orders were subsisting or had discharged by operation of law. I find support in the judges remarks where it is pointed that the interim orders actually bar the 1<sup>st</sup> defendant from interference with what is on the suit premises and that invariably included the applicants.

11. On the basis of the foregoing and the need to render substantive justice I decline the invitation to find that the applicants lack locus standi to file the present application. They are also entitled to the protection of this court. Having made a finding in this regard I will proceed to consider the substantive application.
12. The application dated September 30, 2021 is brought under section 1A, 1B & 3A of the [Civil Procedure Act](#). The applicants crave that there be an order stopping the defendants by themselves, their agents including M/s Kilimanjaro auctioneers from selling or disposing the applicant's items removed from the suit premises on September 24, 2021 pending further orders of the court. This is basically a restraining order. Rehashing the facts of the application as set out in the affidavit of Fredrick Siasa Munyithya which are also set out in the application for joinder herein it is submitted on behalf of the applicants that they entered the suit property and remain in the suit property as a consequence of a land lord and tenant relationship between them and the plaintiff. That there is no landlord tenant relationship between them and the 1<sup>st</sup> defendant. That there was no legal basis therefore upon which the 1<sup>st</sup> defendant could enforce the rights of a landlord on the applicants as his tenants. Further that no notice of distress for rent by the 1<sup>st</sup> defendant was served upon the applicants consequently short of a notice of proclamation any removal of the goods by the auctioneer was null and void ab initio. Additionally, that the 1<sup>st</sup> defendant remains a stranger to the applicants. This court has been urged to put right the wrong committed by the auctioneer.
13. I'm inclined to refer again to the ruling by Justice Sila Munyao herein for I see no need for reinvent the wheel. The learned judge on June 16, 2021 rendered that a decision has not been made on who owns the property between the plaintiff and the 1<sup>st</sup> defendant. That since orders of injunction had been issued against the 1<sup>st</sup> defendant from interfering with the suit property, the defendant should not demand payment of rent from the applicants and neither should they evict them. No objection was raised then by Mr Ngonze that the orders of interim injunction had lapsed.
14. Indeed, the court having not made a final determination on the ownership of the suit property between the plaintiff and the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant cannot purport to collect rent from the applicants when rent was being collected by the plaintiff. The applicants state that they have a lease agreement with the plaintiff and this is exhibited before the court. Moreover, even the arguments by the 1<sup>st</sup> defendant that by dint of section 25 & 26 of the [Land Registration Act](#) they are prima facie registered owners cannot be sustained since the said title is being impeached by the plaintiffs. It can only await the determination of this court whether it will be upheld. This further cements my resolve to ensure that the applicants should be protected pending the determination of the ownership of the suit property herein.
15. The applicants have stated that the attached goods are donations to them from well-wishers and are church equipment which is confirmed by the inventory. It is apparent from the pleadings that the applicants represent the South Community Church and whose activities have been stopped by the 1<sup>st</sup> defendant's actions. I think applying the balance of convenience this clearly tilts in favor of the applicants and the orders sought for the return of the equipment's is merited.
16. The following orders hereby issue to dispose of the application dated September 30, 2021 that;



- i. The notice of motion application dated September 30, 2021 is hereby deemed as properly filed before this court.
- ii. There be an order stopping the defendants by themselves, their agents including M/s Kilimanjaro auctioneers from selling or disposing the applicant's items removed from the suit premises on September 24, 2021 pending further orders of the court.
- iii. That the orders issued by CMCC Misc Civil Case No E005 of 2021- Kwale on May 4, 2021 and all proceedings thereof be stayed pending further orders of this court,
- iv. M/s Kilimanjaro auctioneers be ordered to release to the applicant unconditionally all items removed from the suit premises on September 24, 2021, forthwith,
- v. Costs shall be in the cause.

Orders accordingly

**DELIVERED AND DATED AT KWALE THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2022**

**A E DENA**

**JUDGE**

**Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:**

Mr Mkomba h/b for Mr Munyithya for the applicants/interested Party

Mr Jengo for the plaintiff

Mr Kiptoo h/b for Mr Kibet for 1<sup>st</sup> defendant

Mr Denis Mwakina- Court Assistant.

